Filed 4/26/06 In re Angelina M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re ANGELIA M. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. J.D., Defendant and Appellant; QUAPAW TRIBE OF OKLAHOMA, Intervener and Respondent.	E039296 (Super.Ct.No. SWJ003831) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert W. Nagby, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Carol A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Minors.

No appearance by Intervener and Respondent.[1]

J.D. (the mother) appeals from an order terminating parental rights to two of her children, Angelia M. and D.M. She contends the juvenile court failed to follow the placement preference dictated by the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) (the ICWA). We will hold that, in terminating parental rights, the juvenile court neither made nor needed to make any placement determinations; accordingly, even assuming, for purposes of argument, that at some point it failed to follow the ICWA placement preference, this is not a reason to reverse the order terminating parental rights. Thus, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

The father of the children is not a party to this appeal. However, he and the mother had a history of domestic violence. On November 1, 2004, the mother was in a car with some recent acquaintances; Angelia, then age two, and D., then age one, were in car seats. The father got into an argument with the mother and dragged her out of the car. Both parents then walked away, leaving the children behind. The acquaintances

[1] The Quapaw Tribe of Arizona has been given notice of the appeal and has been served with copies of all of the briefs. In response to our inquiries, it has informed us, by letter, that it is in favor of affirmance but does not wish to file a brief.

protested, but the father said, "I don't care what you do with them." The children were filthy and had no shoes.

As a result, the children were detained, and the Riverside County Department of Public Social Services (the Department) filed a dependency petition concerning them. On November 9 (or 19), 2004, they were both placed with foster parents, who are now seeking to adopt them.

The social worker learned that the paternal grandmother was a member of the Quapaw Tribe (the Tribe). Accordingly, notice of the proceedings was given to the Tribe and to the Bureau of Indian Affairs. The Tribe filed a motion to intervene. On February 1, 2005, the juvenile court, finding that the children were Indian children, granted the motion.

On February 28, 2005, at the jurisdictional/dispositional hearing, the juvenile court found jurisdiction based on failure to protect, as to both parents (Welf. & Inst. Code, § 300, subd. (b)), and failure to support, as to the father only. It formally removed the children from the parents' custody. It also found that their placement with the foster parents was appropriate.

On June 1, 2005, when the social worker asked if there were any relatives who might be willing to take the children, the mother suggested the paternal grandmother. The paternal grandmother, however, indicated that she did not want to take the children and that she felt they would be better off with the prospective adoptive parents.

On July 1, 2005, a maternal aunt phoned the social worker. She said she was concerned about the children being adopted because she wanted to continue to play a part in their lives. The social worker asked why she had not sought placement. According to

the social worker, the maternal aunt replied that, when the children were first detained, she had been working and going to school. She added that she was no longer going to school. The social worker then asked "if her only interest was in being able to have contact with the children. [The maternal aunt] indicated that this was her interest, but she [also] wanted to make sure the children were going to a good home."

On July 6, 2005, at the six-month review hearing, the juvenile court terminated reunification services and set a hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26). Once again, it found that the children's placement with the foster parents was appropriate.

On July 15, 2005, the Tribe advised the social worker that it "approves of and supports . . . the present placement of the . . . children." It also "agree[d] that case movement, in the best interest of the children, be toward the legal termination of parental rights and that the appropriate paperwork be initiated for the current foster parents to be able to adopt these children."

On August 17, 2005, after a visit with the children, the maternal aunt left a message for the social worker. She repeated that she wanted to be a part of the children's lives. She also expressed concern that the children supposedly were speaking only Spanish.

On August 22, 2005, the social worker left a message for the maternal aunt. She said that postadoption contact would be up to the prospective adoptive parents. She also told the maternal aunt that the children spoke both English and Spanish; she herself spoke English with them.

On November 3, 2005, at the section 366.26 hearing, the Tribe's duly authorized spokesman testified that the current placement of the children was "in compliance with [s]tate and [f]ederal laws," and therefore the Tribe "waive[d] placement in an Indian [f]oster [h]ome as required under the Indian Child Welfare Act." He added that, even if a relative became available for placement, the Tribe would not "change [its] waiver[.]" He was not concerned about the children "losing their Native American heritage in this placement," because they had not previously participated in traditional cultural activities, and the prospective adoptive parents had agreed to enroll them in the Tribe.

The Tribe's representative further testified that the Tribe had been "trying to make contact with local family, local relatives, of these children, looking for family members to come forward on the maternal side that would possibly be interested in adopting these children." He was aware of the maternal aunt as well as a maternal uncle.

The mother introduced, without objection, and the juvenile court admitted, an unsworn written statement by the maternal aunt. In it, she stated that, when the children were first detained, the original social worker had asked her if she would take the children. She had said she would be happy to do so, but only if she could be reimbursed for daycare, because she worked full time and was going to school. The social worker had told her this was not possible.

After a new social worker was assigned, the maternal aunt phoned her. According to the maternal aunt, when she said she wanted to be a part of the children's lives, the social worker "with a condescending tone asked [her, 'W]ell[,] w[h]ere have you be[en] all this time[?']" She explained that she had been in touch with the original social worker, who had told her that she could not be reimbursed for daycare. The new social

worker said this was true. The maternal aunt, however, retorted that a coworker had told her it was not true and that she could be reimbursed. The new social worker then said, "[W]ell[,] you could do that[,] but [you] would have to go thr[ough] a lengthy process . . . ." The social worker further told the maternal aunt that she would have "to rebuild a relationship with the children." She agreed to do so. Accordingly, she had begun visiting the children; however, the social worker and the prospective adoptive mother had interfered with visitation and made it extremely difficult.

Counsel for the mother then asked that the section 366.26 hearing be continued because the children had not been placed with the maternal aunt, as the ICWA placement preference (25 U.S.C. § 1915; see also Cal. Rules of Court, rule 1439(k)) assertedly would require.

Initially, the juvenile court seemed to accept that "either[] misinformation or [a] misunderstanding caused the [maternal aunt] to decline placement, at least at the time . . . ." However, it then added: "Maybe it's not a misunderstanding[;] this Court is aware that at one time there were no funds to provide childcare services to people who were prospective family relatives. In other words, apparently, th[e maternal aunt] . . . really at the time was not in a position to take the children . . . and then subsequently she found that funds may be available. Actually, subsequently -- I don't know the exact date -- funds did become available to provide some childcare, not total childcare, but for some childcare. . . . [¶] In other words, there was a change. It appears that the aunt became aware of that and at the time threw her hat back into the ring."

It then denied the request for a continuance. It explained: "[E]ven if the tribe had just sat on its hands and done nothing, which is not the case here, but had they done that

even their rights might dwindle through time. . . . Here, the[children] have been left there in their current placement with the full knowledge of the tribe and with the acquiescence of the tribe as well . . . . [¶] In looking at the children's best interest . . . , I think the -- within the meaning of ICWA, the statutory requirements have been met in that regard . . . ."

Next, counsel for the mother asked the juvenile court not to terminate parental rights and to select a plan of legal guardianship instead, to "enable the Department to . . . place the children with the maternal aunt that is requesting placement, and the children would be able to be placed in accordance with ICWA."

The juvenile court responded: "[T]he tribe has waived the preferences set forth in ICWA . . . ." It added: "[R]egardless of what happened, whether I wanted to believe that the aunt just couldn't take these children and made that decision, or that subsequently she gained information that she might be able to receive childcare and could take the children, or had a change of heart when she found out the children were to be adopted, here, again, time marches on for children. All things can be waived in time. [¶] We also need to keep in mind relative placement, even absent ICWA, relative placement preferences as well, but those dwindle over time as the child is in a non-relative home, and time goes on, and the child develops relationships in those homes." It concluded: "With regard to going to any other plan, it wouldn't be justified in this case. None of the exceptions apply."

The juvenile court found that the children were adoptable. Accordingly, it terminated parental rights.

II

APPLICATION OF THE ICWA PLACEMENT PREFERENCE

The mother's sole appellate contention is that the juvenile court erred by failing to follow the ICWA placement preference.

Under the ICWA, in making any foster care, preadoptive, or adoptive placement of an Indian child, a preference must be given, absent good cause to the contrary, to a placement with a member of the child's extended family. (25 U.S.C. § 1915(a)(1), (b)(i); see also Cal. Rules of Court, rule 1439(k)(1)(A), (2)(A).) This includes an aunt or uncle. (25 U.S.C. § 1903(2); see also Cal. Rules of Court, rule 1439(a)(7).)

The problem here is that, even if the mother is correct -- i.e., even if the maternal aunt should have been considered for placement at some point -- the juvenile court properly terminated parental rights. At the jurisdictional/dispositional hearing, when the juvenile court found that the children's placement with the foster parents was appropriate, the mother did not object; thus, she waived any objection based on the ICWA placement preference. Moreover, she failed to appeal from the jurisdictional/dispositional order, which therefore became final and res judicata. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393; *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340 [Fourth Dist., Div. Two].) She committed the same failures in connection with the six-month review hearing, with the same consequences.

At this point, the only order from which the mother can or did appeal is the order entered at the section 366.26 hearing. At that hearing, however, the juvenile court is not called upon to consider any issue concerning placement. It must select a permanent plan for the child. (Welf. & Inst. Code, § 366.26, subd. (b).) Moreover, if it finds that the

child is likely to be adopted, it *must* select adoption as the permanent plan, unless if finds that termination would be detrimental to the child, for one of five statutorily specified reasons. (Welf. & Inst. Code, § 366.26, subd. (c)(1).) Placement is simply irrelevant to any of the matters that are up for decision.

There are two possible exceptions, but neither of them is applicable here. First, once the juvenile court selects adoption as the permanent plan and terminates parental rights, the Department has exclusive control over placement; the juvenile court can, however, review the Department's placement decision for abuse of discretion. (*In re Jacob E*. (2004) 121 Cal.App.4th 909, 921-922; *In re Harry N*. (2001) 93 Cal.App.4th 1378, 1397; *Los Angeles County Dept. of Children etc. Services v. Superior Court* (1998) 62 Cal.App.4th 1, 9-10; *Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 731-734.) Here, the mother was not asking the juvenile court to overrule the Department's placement decision. She recognized that the Department had not yet evaluated the maternal aunt for placement; after all, the aunt might turn out to have a disqualifying criminal conviction or an unsuitable home. The mother only asked the juvenile court to continue the section 366.26 hearing or, alternatively, not to terminate parental rights. Moreover, even assuming the Department had, in fact, abused its placement discretion, the juvenile court could properly deny the requested continuance, terminate parental rights, and deal with any abuse of the Department's placement discretion thereafter.

Second, under an amendment to section 366.26 that became effective on January 1, 2006, the juvenile court "may designate a current caretaker as a prospective adoptive parent if the child has lived with the caretaker for at least six months, the caretaker

currently expresses a commitment to adopt the child, and the caretaker has taken at least one step to facilitate the adoption process." (Welf. & Inst. Code, § 366.26, subd. (n), Stats. 2005, ch. 640, § 6.5.) Being designated by the Department as the adoptive family is considered a "step[] to facilitate the adoption process." (Welf. & Inst. Code, § 366.26, subd. (n)(2), Stats. 2005, ch. 640, § 6.5.) This provision, however, was not in effect when the section 366.26 hearing in this case was held. Thus, the juvenile court did not designate any particular prospective adoptive parents.

Admittedly, the juvenile court did order "[t]hat an application for adoption by the current caretakers be given preference over any other application." However, this was required by Welfare and Institutions Code section 366.26, subdivision (k), even in the absence of any such order. Moreover, all it means to "be given preference" is that "the application shall be processed . . . before the processing of the application of any other person for the adoptive placement of the child." (Welf. & Inst. Code, § 366.26, subd. (k).) The order in no way determined that the children should, in fact, be placed with the prospective adoptive parents rather than with the maternal aunt.

Finally, as an alternative basis for affirmance, we hold that the juvenile court did not violate the ICWA placement preference. Rather, it found good cause to depart from the placement preference -- because the Tribe had waived it, and because, due to the failure to raise the issue earlier, the children had been allowed to bond with the prospective adoptive parents. Although it did not use the words "good cause," it did find that "looking at the children's best interest . . . , I think the -- within the meaning of ICWA, the statutory requirements have been met in that regard . . . ."

"[W]e . . . apply to the juvenile court's good cause finding the substantial evidence standard of review . . . ." (*Fresno County Dept. of Children & Family Services v. Superior Court* (2004) 122 Cal.App.4th 626, 646.) Here, the children had been with the prospective adoptive parents for almost exactly a year -- about half of D.'s life, and a quarter of Angelia's. Two different social workers both opined that a parent-child bond had been established. The maternal aunt, on the other hand, had had only two or three visits. At her first visit, "the children did not know who [she] was." This was ample evidentiary support for the juvenile court's finding of good cause to depart from the ICWA placement preference.

The mother argues that the juvenile court should not have relied on the Tribe's waiver because the Tribe may not have been aware that the maternal aunt was available for placement. The Tribe's representative, however, testified that, even if a relative were available for placement, it would still waive the placement preference. Moreover, in this appeal, the Tribe, with full knowledge of the maternal aunt, has adhered to its waiver.

The mother also argues that, while the ICWA allows a tribe to "establish a different order of preference," this can only be done "by resolution." (25 U.S.C. § 1915(c).) The Tribe, however, did not purport to establish a different order; rather, it waived its right to insist on the statutory order. A resolution was not required to do this.

We therefore conclude that the juvenile court correctly found good cause not to follow the ICWA placement preference. However, even assuming it somehow erroneously failed to follow the ICWA placement preference, this would not be a reason to reverse the order appealed from.

III

DISPOSITION

The order appealed from is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

KING
J.